

ONTARIO HUMAN RIGHTS CODE

R.S.O. 1990. c. H.19

BETWEEN:

ANITA HALL

Complainant

-and-

ONTARIO HUMAN RIGHTS COMMISSION

Commission

-and-

A-1 COLLISION AND AUTO SERVICE
and MOHAMMED LATIF

Respondents

DECISION

BOARD OF INQUIRY: Deborah J.D. Leighton

APPEARANCES: Catherine Pike

Counsel for the Ontario
Human Rights Commission

Ravi Shukla

Counsel for the Respondents

Date of Decision: November 23, 1993
Toronto, Ontario

I. DECISION

On October 5, 1992, pursuant to sub-section 38 (1) of the Human Rights Code R.S.O. 1990, c. H.19 (the Code), I was appointed by the Minister of Citizenship as the Board of Inquiry to hear and decide the complaint of Anita Hall, now Anita Trotter, alleging discrimination on the basis of harassment, sexual solicitation and reprisal by A-1 Collision and Auto Service (A-1 Collision) and Mohammed Latif, Manager and one of the co-owners at A-1 Collision.¹ A-1 Collision is no longer operating.

Having carefully considered the evidence which was presented to me, reviewed the exhibits and the transcripts in this case, I find that Mr. Latif harassed Ms. Trotter, and subjected her to sexual solicitation and reprisal, contrary to Sections 7(2), 7(3)(a) and 7(3)(b) of the Code.²

II. REASONS

A) The Law

Ms Trotter and the Commission base this complaint on sections 7(2), 7(3)(a) and 7(3)(b) of the Code. Section 7(2) provides that:

Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

Section 7(3)(a) and (b) provide that:

Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the

¹Professor Brettel Dawson made an interim decision concerning the effect of delay on this case dated August 28, 1992. She then withdrew from the case because she received certain information regarding settlement discussions. I was then appointed by the Minister of Citizenship. At the outset of this hearing, respondent's counsel asked whether he should make the same preliminary objections again. I made a ruling that we should continue with the hearing into the merits of the case.

²Throughout this decision all references to the Code will use the Revised Statutes of Ontario, 1990: there has been no change in the Code relevant to this case, since the original events occurred.

solicitation or advance knows or ought reasonably to know that it is unwelcome;
or

(b) a reprisal or threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

Harassment is defined in the Code as a "course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome." Section 10(f). The Cuff v. Gypsy Restaurant (1987), 8 C.H.R.R. D/3972 (Ontario Board of Inquiry), decision outlines the elements in the Code necessary to prove 1) harassment, 2) solicitation, and 3) reprisal. The Board in Cuff points out that while a "course of vexatious conduct and comment is necessary to prove harassment under section 7(2), only one sexual solicitation or advance is necessary to prove a violation of the Code under section 7(3).

It is well settled law that harassment because of sex has been found in cases where employers or others have made unwanted compliments or comments of a sexual nature and/or persisted in initiating discussions about sex. Bell v. Ladas (1980) 1 C.H.R.R. D/155 at D/156 (Ontario Board of Inquiry). Sexual solicitation occurs as the Cuff case explains if each of the elements of Section 7 (3)(a) of the Code are proven. Reprisal has been held to occur where an employee refused to have sex with her employer and was fired. Bishop v. Hardy (1986) 8 C.H.R.R. D/3868 (Ontario Board of Inquiry).

B) The Facts

Mr. Latif invited Ms. Trottier to take a job with A-1 Collision while she was working as a parts delivery person for another company. The complainant began work with A-1 Collision around March 14, 1985 as a Secretary/ Receptionist. From the very first day of employment it was her evidence that the respondent, Mr. Latif, made comments of a sexual nature including gestures and touching which became increasingly more aggressive as the days went on. He made statements such as, "I'd like to take you to a motel room and fuck you."

Ms. Trottier's evidence was that she also became increasingly more aggressive in repulsing this behaviour. In one incident the respondent came up from behind her and put his hand around her thighs. At this point Ms. Trottier grabbed Mr. Latif and threw him into a wall. She testified that she literally screamed at him to keep back. The more she rejected these advances the more amused he was. Ms. Trottier gave evidence that while Mr. Latif was in the

office which he shared with her the harassment was almost continual, and the verbal harassment, explicit.

Very often in these cases, there is no witness to such harassment. However, in this case there was a witness to one solicitation incident. Sam Bloxam, an employee of A-1 Collision, testified that he came in from the shop where he had been working and witnessed Mr. Latif stroking Ms. Trottier's shoulder and overheard the following words "If you had me for a man, you would not go back to any other." Mr. Bloxam also testified, that Ms. Trottier had a "sort of disgusted look on her face." Mr. Latif suggested in his evidence that both Mr. Bloxam and Ms. Trottier may have misheard what he said. In very confusing testimony he doesn't specifically deny that he made the statement.

There is also evidence from Ms. Trottier's mother, and a close family friend that the complainant spoke to them of the on going harassment at her work place and her concern about what to do about it, at the time it was occurring.

I find that Mr. Bloxam was a credible witness even though he attempted to take back a statement that he made to the Human Rights Commission regarding the incident which he witnessed referred to above. Mr. Bloxam wrote to the Commission and stated that he retracted his original statement. However, at the hearing he stated very clearly that the reason for doing this was so that he would no longer be involved with the case: he did not want to testify at a hearing. However, he stated unequivocally that he had a clear memory of witnessing the incident. He was consistent and forthright on this point when cross-examined by the respondent's counsel.

Although there was an argument by the respondent's counsel that Mr. Bloxam was conspiring with Ms. Trottier against Mr. Latif, there was no evidence to support this, not even from Mr. Latif. In fact, Mr. Latif could not remember why Mr. Bloxam left employment at A-1 Collision. Mr. Latif recounted taking a vehicle to Mr. Bloxam's new shop for a repair sometime after Mr. Bloxam had left A-1 Collision.

Around the end of March Ms. Trottier was injured in a car accident. She was rear ended while driving a car owned by A-1 Collision. As a result of this car accident, Ms. Trottier was off work from April 1st to the 5th of 1985. During the period that she was off work, she received frequent phone calls to her home from Mr. Latif that included sexual and suggestive

remarks to her.

She came back to work on April 8, 1985 and then sometime about April 10, 1985, she was hospitalized as a result of a reaction to a drug that had been given to her because of her accident. According to Ms. Trottier's evidence, Mr. Latif continued to call her to her home after she was discharged from hospital and make sexually suggestive and explicit remarks. She gave evidence that she found this to be intimidating and frightening and at one point was worried that Mr. Latif might come to her house.

This brings me to the last part of Ms. Trottier's complaint which is that her employment was terminated because she failed to respond favourably to Mr. Latif's sexual advances. Ms. Trottier stated at the hearing that it was either Mr. Latif or his partner, Mr. Aziz who called her to her home and told her that her employment was terminated. In her complaint she indicates it was Mr. Latif.

The respondent has denied that Ms. Trottier was terminated but the respondent has no explanation for her termination. It was the respondent's evidence that Mr. Aziz, the other owner of A1-Collision, called to find out when Ms. Trottier would be returning to work and when he was told that she wasn't sure, he informed her that they would have to hire a temporary to replace her. However the respondent's questionnaire states that Ms. Trottier was told when she was off sick that unless she returned, the company "would unfortunately have to replace her."

There is no mention of it being temporary. Further the Respondent's questionnaire states that Mr. Latif fired Ms. Trottier. Mr. Latif's evidence at the hearing was that this was a clerical error. Although at the hearing the respondent said Ms. Trottier was not fired, he had great trouble remembering what happened. Then in cross-examination he said:

I did not fire her. I thought Mr. Aziz is the one who did it. Whatever, but he told me go ahead hire somebody, so we put an ad in the paper.

Considering all the evidence on this point, and the contradictions in the respondent's evidence, I am persuaded by Ms. Trottier's evidence and I find that Ms. Trottier's employment was terminated by A-1 Collision, by Mr. Latif.

The respondent categorically denies ever having harassed the complainant or terminating her employment because she would not respond to his sexual overtures. He defends himself as 1) morally incapable of such behaviour because of his religion and 2) physically incapable

because of an injury to his arm.

The respondent's position is also that the complaint was motivated by revenge arising out of the respondent's refusal to assist the complainant in a fraudulent insurance claim and out of a dispute arising over severance pay. As noted earlier, the respondent's defence also rested on the argument that the complainant and the co-employee, Mr. Bloxam, conspired to make false allegations against the respondent for various reasons, including that they were both racists.

The respondent chose to put his character at issue. First, Mr. Aziz testified to the good character of Mr. Latif and stated that he never saw Mr. Latif harassing Ms. Trottier. However, Mr. Aziz was occupied in a full-time job elsewhere. He was normally only at A-1 Collision in the evenings and on Saturdays, when Ms. Trottier was not at work. Ms. Trottier's evidence, agrees with Mr. Aziz: she only recalls seeing Mr. Aziz on one or two occasions. Thus Mr. Aziz's evidence that he saw nothing untoward is in no way helpful to me in deciding this case.

Mr Aziz also stated that he had a high opinion of Mr Latif, that he was a practicing Muslim and not the type of person that would harass a young woman. However, Mr. Latif told Garry Speranzini, the Human Right's Investigator in this case, at a conciliation meeting, that Ms. Trottier was "the ugliest secretary he ever had." Mr. Latif acknowledged this statement in cross-examination. He said further that he would not be attracted by her. Commission counsel's view of this evidence in argument was that it was revealing about Mr. Latif's underlying assumptions about women. It is certainly of no assistance in supporting the respondent's defense that he was morally incapable of harassing Ms. Trottier.

Further evidence about Mr. Latif's character, presented in the examination-in-chief of Mr Latif, was that he was fired some years ago from his job as a Customs Officer for bringing in goods without paying duty. Mr. Fitzmorris, a witness for the respondent, said that this firing led to a complaint to the Canadian Human Rights Commission, that Mr. Latif was singled out for unfair treatment because of his race. Mr. Latif's evidence on this was that there was a conspiracy against him because he was a person from Pakistan: the people who fired him were racists.

Evidence that the body-shop which Mr. Latif purchased was previously owned by a Mr. Dhaliwal was presented by the respondent. Mr. Dhaliwal stayed on to help Mr. Aziz and Mr. Latif learn the business of the body-shop and get the business going.

In January of 1985 the police came looking for Mr. Dhaliwal and a particular record book. Mr. Latif did not give the police this book although he knew they were looking for Mr. Dhaliwal in connection with certain fraudulent insurance claims for which Mr. Dhaliwal was later convicted. Mr. Latif at first gave evidence that when he found out that Mr. Dhaliwal was wanted by the police, he fired him. But this is not so. Mr. Aziz and Ms. Trottier stated that Mr. Dhaliwal was still working for A-1 Collision in April when Ms. Trottier was there. Further, in cross examination Mr. Latif recognized that Mr. Dhaliwal was still working in the shop when Ms. Trottier was there in April.

Mr. Bloxam described the sort of scams that he believed Mr. Dhaliwal was involved in and that were taking place at the shop while he was an employee and while Mr. Latif owned the shop. These scams occurred while Mr. Dhaliwal was reporting to Mr. Latif. An example of one insurance scam was to take a damaged car and further damage it so as to increase the claims. Mr. Latif stated that he knew nothing about this. Mr. Aziz acknowledged that Mr. Dhaliwal had suggested to him that they give insurance appraisers money to get the appraisals "bumped up", and was told that was not the way they were going to do business. However, they did not fire him.

A great deal of time during the hearing was spent attacking Ms. Trottier's credibility and attempting to show a motive for bringing this complaint. One such attack involved an accusation that Ms. Trottier made a false claim after her accident. However after a close review of the evidence of the respondent, it would appear the respondent was angry with Ms. Trottier because she reported the car accident to his insurance company. Although the respondent suggests that Ms. Trottier wanted to make a "false claim" against the insurance company, there was absolutely no evidence except his testimony that she reported the accident to his insurer. There was a vague reference to it in Mr. Latif's testimony regarding the incident when Mr. Bloxam overheard Mr. Latif making an advance to Ms. Trottier. The respondent's counsel asked Mr. Latif if he could have said something similar to: "If you have me, you will never have another." Mr. Latif said:

I may have said it because the conversation as far I remember the fake like exact which I cannot choose it, but I do remember saying that if you are -- like, if I am your husband, I will never let my wife to make a false claim although neck is not hurting and collar is there and you are claiming from insurance. I don't let my wife to do illegal things. Something of that nature I may have said, that making

wife to do illegal things. Something of that nature I may have said, that making all these allegations.

The complainant denies ever having tried to make a fraudulent claim. It was Ms. Trottier's evidence in reply that Mr. Latif wanted to claim that Ms. Trottier was driving a different company car when she had her accident and that it is she who refused to be part of a false claim.

Similar to the position taken by the respondent on the insurance claim is his view that this complaint was motivated out of revenge because Ms. Trottier had to go to the Employment Standards Branch to collect \$26.00 in severance pay. Mr. Latif paid the claim although he apparently considered it invalid. When asked about this incident, Ms. Trottier had no memory of it. Since she succeeded in collecting the money it seems unlikely that she was being motivated by revenge. Even if she was motivated by revenge, it does not mean the sexual harassment did not occur.

As to the argument that Mr. Latif was not physically able to have harassed Ms. Trottier in the manner which she described which included grabbing and touching, this evidence is not convincing. Medical records supplied by the respondent show that an accident to Mr. Latif's arm occurred the end of January and a medical assessment at the end of March said that he was ready for physiotherapy. However all of this is irrelevant since there is nothing to suggest that he couldn't have done the grabbing and touching with his other arm. And certainly the fact that his arm had been broken would not affect the continual barrage of sexual comments.

After examining all the relevant evidence I am obliged to decide whether the complainant has proven her case applying the test of a balance of probabilities to the evidence. As counsel for the Commission argued in closing, this is the standard to be applied whether the evidence is direct or circumstantial. Once the complainant establishes a prima facie case the onus shifts to the respondent to provide an explanation which is credible on the evidence.

C) Summary

Applying the test of a balance of probabilities I find for the complainant. Ms. Trottier was entirely credible as to the harassment which took place. She was consistent and her memory of crucial events was clear. Certainly some details, particularly on dates, had faded with the passage of time, but the events were clear in her memory. She was subjected to harassment

such as comments about her physical appearance and explicit sexual remarks, as noted earlier. She was touched and the evidence shows she made it clear that these sexual advances were unwanted to the point on one occasion of throwing Mr. Latif across the room and screaming at him.

There was a witness to one solicitation and this witness stated that such things stand out in one's memory and that he had a clear memory of the event. Two witnesses close to the complainant remember her speaking with concern and fear about what she should do since she was in a new job and her boss was harassing her.

Counsel for the Commission argued that if I found Ms. Trottier's allegations occurred that they constituted harassment, solicitation and reprisal. Counsel for the respondent did not disagree. As noted earlier, it is well established that this kind of behaviour is harassment and solicitation therefore a violation of the Code.

The respondent's defence consisted of an attack on Ms. Trottier's character, that she was motivated by malice and revenge, and a corresponding assertion that Mr. Latif was a man of superior morals. Much of the character evidence on Mr. Latif is irrelevant to proving whether he sexually harassed Ms. Trottier. However, this evidence, especially regarding his business dealings, tends to contradict the respondent's credibility.

The respondent's evidence was difficult to follow and while he clearly denied the harassment he could not support the accusation that the complainant and Mr. Bloxam, conspired together so that Ms. Trottier could bring a Human Rights complaint against him. There was no plausible reason for Mr. Bloxam to act in that way. In fact, as noted earlier, there was clear evidence that Mr. Latif had dealings with Mr. Bloxam of a business nature and that Mr. Bloxam left Mr. Latif's shop voluntarily. Mr. Latif could not remember whether he left or was fired. Further there was no plausible reason in the evidence for Ms. Trottier to make a false accusation against Mr. Latif.

There was a suggestion by Mr. Latif that both the complainant and Mr. Bloxam were racists. Mr. Latif also accused those who fired him for smuggling of racism. Mr. Latif's accusation that others are racists does not make them so, and does nothing to counter the strong evidence in this case of sexual harassment, solicitation and reprisal. Even if both the complainant and Mr. Bloxam were racists, which I do not find, it in no way diminishes the

evidence that sexual harassment did occur.

The respondent has not been able to convince me that there is any merit in any of his defenses.

Respondent's Counsel renewed his argument, brought originally in a preliminary objection to Professor Dawson, that because of delay in hearing this case, it should be dismissed. He argued that I must decide between the credibility of the complainant and the respondent and that the delay made it impossible. I disagree.

Boards of Inquiry have indicated that if delay in hearing a case effects the evidence so that it is not possible to make a decision, then the complaint should be dismissed. Hyman v. Southam Murray Printing (No.1) (1982), 3 C.H.R.R. D/617. However, as indicated above, I have sufficient evidence to support Ms. Trottier's complaint. I did not have to rely only on the complainant's evidence. Further I heard no evidence to persuade me that the respondent was prejudiced by the delay in defending this complaint.

I find for the reasons above that the complainant made out a prima facie case of harassment and solicitation. The inference I draw from her termination is that it was reprisal.

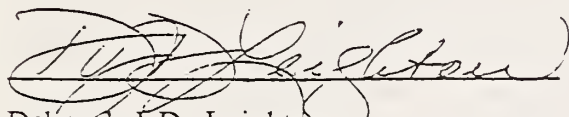
Thus I find that A-1 Collision and Mr. Latif breached Sections 7(2), 7(3)(a) and 7(3)(b) of the Code by harassing Ms. Trottier because of her sex, subjecting her to solicitation and reprisal.

III. Order

After Ms. Trottier was fired from her job at A-1 collision, it took her approximately one month to find another job and the respondent did not question that attempt to mitigate her damages. Since her gross salary was \$220.00 a week, Mr. Latif shall pay her \$1,000.00 in special damages to compensate for approximately one month's salary. Given the nature of the evidence of the harassment, sexual solicitation and reprisal that Ms. Trottier gave up a job to go to A-1 Collision, that the harassment was so explicit and continual and that she was even harassed by telephone to her home, in this case, I agree with the submission of commission counsel that an award of \$3,500.00 in general damages is appropriate. I decline to award interest on the general damages.

Prejudgment interest on the special damages shall be calculated on the Courts of Justice Act rate from the date of the complaint to the final date of the hearing. The damages shall be paid to Ms. Trottier by the individual respondent, Mr. Latif, within three months of this

decision. If payment is not made in full within the three months from this decision post-judgment interest shall begin to accrue at the Courts of Justice Act rate for post-judgment interest. If there is any dispute as to the interest I shall hear submissions and make a further order.

A handwritten signature in cursive script, appearing to read "Deborah J.D. Leighton", written over a horizontal line.

Deborah J.D. Leighton,
Board of Inquiry.

